In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1167

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 37-38; Pet. App. 8-9) is reported at 329 F. 2d 494.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1964 (R. 38; Pet. App. 10). A petition for rehearing was denied on May 5, 1964 (R. 41-45; Pet. App. 11). The petition for a writ of certiorari was filed on June 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show petitioner's identity as the accused.

2. Whether the evidence was sufficient to prove venue.

STATEMENT

Petitioner was charged in a three-count indictment with possession, in Chatham County, Southern District of Georgia, of non-taxpaid whiskey on November 15, 17, and 21, 1961, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (R. 1-2). In a trial to the court (a jury having been waived), the district judge found petitioner guilty on all three counts and imposed consecutive sentences of imprisonment for one year on each count (R. 3, 4, 20-23). On appeal the conviction was affirmed (R. 30-31, 38; Pet. App. 10).

The evidence showed that agent Boatheimer, an Alcohol and Tobacco Tax investigator, was working undercover in the area of Savannah, Georgia (R. 5, 10-11). Boatheimer testified that on November 15, 1961 he delivered 50 gallons of non-taxpaid whiskey to the home of Joe Delegal in Savannah, Georgia. Delegal ordered three men standing there with him to unload the whiskey, which they moved into some houses nearby. Boatheimer testified that he made similar deliveries to petitioner under the same circumstances on November 17 and November 21, 1961 (R. 8, 10, 11, 12, 13).

Testifying on his own behalf, petitioner denied that on November 15, 1961 a delivery of 50 gallons of liquor was made to his home (R. 16-17). Petitioner denied knowing agent Boatheimer and stated that he had never seen him before (R. 18).

ARGUMENT

1. Contrary to petitioner's contention, the evidence was sufficient to identify him as the Joe Delegal to whom liquor was delivered.[1] There was no misapprehension on the part of the court, the attorneys, or the petitioner that agent Boatheimer in his testimony was referring to the petitioner, Joe Delegal, the man on trial. On the cross-examination of Boatheimer he testified as to conversations on the relevant dates in the indictment with "this defendant" (R. 11). Moreover, when the court asked petitioner if he had seen Boatheimer before, petitioner denied that he had ever seen him (R. 18). In so attempting to refute Boatheimer's testimony, the petitioner necessarily recognized that Boatheimer had been testifying about him. The clear inference from the totality of the evidence is that there was sufficient identification of petitioner as the Joe Delegal to whom liquor was delivered.

2. Venue in all three counts of the indictment in the "County of Chatham, within the Southern District of Georgia" was sufficiently proved. Agent Boatheimer testified that on November 15, 1961 (Count 1)

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[1] A similar contention, as to the accused's identity was rejected in *United States* v. *Griffin*, 329 F. 2d 495 (C.A. 5), pending before this Court in No. 1168, O. T. 1963.

he delivered 50 gallons of non-taxpaid whiskey to the home of the petitioner "here in Savannah, Georgia" (R. 8). The district court could take judicial notice that Savannah is in Chatham County in the Southern District of Georgia (Pet. App. 9). Boatheimer testified as to similar deliveries to petitioner under the same circumstances on November 17 and November 21, 1961 (the transactions involved in Counts 2 and 3 of the indictment) (R. 8). It was unnecessary that he specifically repeat that these deliveries were in Savannah, Georgia, since this was an unmistakably clear inference from his testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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